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IN THE DISTRICT OF THE UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff(s),

vs.

PHARMACIA CORPORATION,
(F/K/A MONSANTO COMPANY) et
al.,

Defendant(s).

PHARMACIA CORPORATION (f/k/a
Monsanto Company) and SOLUTIA INC.)

Counterclaim Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Counterclaim Defendants.

ORIGINAL

Case No. 99-63-GPM

TRIAL OF PRIMARY CASE (U.S. A. V. ROGERS CARTAGE & SAUGET)

(Closing Arguments)

BE IT REMEMBERED AND CERTIFIED that heretofore on 11/20/03 ,
the same being one of the regular judicial days in and for the
United States District Court for the Southern District of
Illinois, Honorable G. Patrick Murphy, United States District
Judge, presiding. The following proceedings were recorded by
mechanical stenography; transcript produced by computer.

REPORTED BY: Molly N. Clayton, RPR, Official Reporter for
United States District Court, SDIL, 750 Missouri Ave., East St.
Louis, Illinois 62201, (618)482-9226, molly@clayton.name

APPEARANCES:

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FOR ROGERS CARTAGE: SCHULTZ & LITTLE, L.L.P., BY: Robert Schultz and Carl Hillemann, 640 Cepi Drive, Suite A, Chesterfield, Missouri 63005-1221

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1 THE COURT: Be seated. All right. Good morning,
2 counsel.

3 MS. TORRENT: Good morning.

4 MR. SCHULTZ: Good morning.

5 THE COURT: This matter is before the court this
6 morning for the closing arguments. A couple of matters, I
7 reviewed the objections in the deposition of Charles Harmon.
8 Those are objections asserted by Rogers Cartage. Those are
9 denied. Overruled. The United States sought leave to file a
10 supplemental trial brief. Granted. And I read that.

11 Now when you argue your case I think I understand what
12 the law is in this area and I think each of you have your
13 copies of the transcript in the case. It seems to me the case
14 it comes down to a fair-- a pretty narrow issue. Indeed the
15 standard for liability is low. Of course, there is no
16 fingerprinting requirement as such. There is no requirement.
17 Or to state it differently there's no requirement that the
18 pollutants found in the affected area are the same pollutants
19 discharged by the defendant.

20 That aside, it is necessary to show that the defendant
21 discharged into the affected area. Of course there's no
22 requirement of fault or what have you. It's a strict liability
23 statute. But that is the showing that must be made. Now after
24 all of the maneuvering and wrestling around and the like I
25 think that's the only issue left in the case.

1 Now if I overlooked it, of course, correct me. I
2 would rather be corrected here than six years from now when
3 this case ends up on appeal.

4 And by the way, if there's anybody interested it's
5 likely to be six years because I'm not inclined to
6 be authorizing, to be granting, any interlocutory appeals. The
7 Court of Appeals in our court doesn't appreciate those.
8 They're rarely, rarely looked upon with approval. So everyone
9 is going to have to wait around until I enter a final judgment
10 in this case.

11 That aside, when you argue your case if you will,
12 particularly the findings that you're really interested in,
13 show me here on the record, point it out to me, that's how you
14 can best help me. And I will go there and read it for myself.
15 It is my intention to come out -- after the closing arguments
16 take a few minutes, compose my thoughts, and rule. I think I
17 told you the appropriate rule-- I always check this to be
18 sure-- but I'm sure it is Rule 52 which provides for a simple
19 ruling on the record as opposed to a-- yeah-- written detailed
20 memorandum. I don't find that my opinions get any better with
21 time. Although some cases require it, these don't. So again
22 you argue your case like you want. I'm not going to stop you,
23 but I don't need a lecture on the law. I've read the law. I
24 think I know where the law is. But point out to me in the
25 evidence what does the evidence here mean and point to me with

1 particularity where the case is or the case isn't.

2 With that aside, Mrs. Torrent, are you going to argue
3 for the United States?

4 MS. TORRENT: I am, your Honor.

5 THE COURT: You may proceed.

6 MS. TORRENT: Thank you. For the court's convenience
7 I have taken the liability of putting together a
8 citations-to-trial-transcript to be used in our closing.

9 THE COURT: Very well.

10 MS. TORRENT: And with your permission if you would
11 still like me to make reference to the testimony as I go
12 through it I'm happy to do so.

13 THE COURT: Well, or if you have the citations here
14 you can just tell me what it is about their testimony that you
15 think makes your case.

16 MS. TORRENT: Good morning. May it please the court.

17 THE COURT: Thank you, it does.

18 MS. TORRENT: At the close of testimony last week,
19 your Honor, you said to us that when it's all said and done
20 this turned out to be a fairly simple case, and we agree.
21 CERCLA very simply requires that the United States prove that
22 Rogers Cartage discharged hazardous substances from its truck
23 washing operations at its Cahokia/Sauget facility. That the
24 same types of hazardous substances were found in the soil,
25 sediments and underlying groundwater, and there was a

1 reasonable migration pathway from the truck washing to the
2 point of release in the environment. We have done that and
3 more.

4 In order to escape liability Rogers Cartage must
5 prove, not just suggest but prove, that not one drop of their
6 discharges from either facility got into Dead Creek. That's no
7 small task. It defies logic in this case and, in fact, flies
8 in the face of the actual evidence.

9 As this court will recall during your first day of
10 testimony Rogers Cartage stipulated to the court that three
11 elements were in fact the case. One that the site is a
12 facility; that there was a release or threatened release of
13 hazardous substances that had occurred; and that the release or
14 threatened release caused the United States to incurred
15 response costs. Thus the sole issue for determination is
16 whether Rogers Cartage is a responsible party. And we submit
17 that that answer is yes. Section 107(a) sets forth those
18 categories of persons considered to be responsible parties and,
19 as the court will recall, from this exhibit which sets forth
20 the various categories of responsible parties. For the most
21 part during our trial we focused on 9607(a)(3) which is
22 otherwise known as arranger liability. And that provision of
23 CERCLA holds liable any person who by contract, agreement or
24 otherwise arranged for disposal or treatment at any facility or
25 incineration vessel owned or operated by any other party or

1 entity and containing such hazardous substances.

2 Now there are two definitions that we have to talk
3 about. One is the definition of facility. The facility is any
4 site or area where a hazardous substance have been deposited,
5 stored, placed or otherwise come to be located. It is not
6 necessarily the superfund site.

7 The second definition that's important for today is
8 that CERCLA defines disposal to include the "discharge,
9 deposit, injection, dumping, spilling, leaking or placing of
10 any solid or hazardous waste into or on the land or water so
11 that such solid waste or hazardous waste or any constituent
12 there of may enter the environment."

13 So in order for the United States to carry its burden
14 and show that Rogers Cartage is liable as an arranger we need
15 to show three things. First, that Rogers Cartage handled
16 chemicals that contained hazardous substances; second, that
17 Rogers Cartage otherwise arranged for the disposal of these
18 hazardous substances by washing them down into the ditches that
19 went to the wetlands in Cahokia and down the drains to the
20 sewer at Sauget; and finally, that the hazardous substances
21 similar to those Rogers Cartage disposed of had an open
22 migration pathway to Dead Creek and are actually present in the
23 soil or the sediment or the groundwater at Dead Creek.

24 We submit that the United States has provided the
25 necessary proof for these elements. First let's consider the

1 chemicals hauled by Rogers Cartage. Who among us can forget
2 the testimony of Don Mayer the former Monsanto employee who
3 emphatically, with grave precision, rattled off the products
4 that Rogers Cartage hauled for Monsanto: Zinc, diphenol
5 phosphates, oleums which is a superconcentrate sulfuric acid,
6 sulfuric acids, chlorosulfuric acid, PCBs, 1242, 1248, 1260,
7 and he goes on and on and on. He ends his answer by saying,
8 "do you want me to keep going?".

9 This exhibit, what we've done with this exhibit here,
10 your Honor, is we have listed the products that were testified
11 to by Don Mayer and also that were admitted by Rogers Cartage
12 in the request for admissions. And we've broken them down to
13 those that were hauled by Cahokia depot and the Sauget depot.

14 What this chart shows you is that Rogers Cartage
15 didn't just haul PCBs, it hauled a wide range of chemicals, and
16 that's important. Rogers Cartage continued the same business
17 in 1970 and hauled almost essentially the same products when it
18 moved to its Sauget facility.

19 Furthermore, Rogers Cartage admitted to hauling PCBs,
20 chlorobenzene and zinc, among many other chemicals. And I
21 refer to request for admission number 12 and request for
22 admission number 27 which states that the trucks containing
23 these same chemicals were washed at its Sauget facility.
24 Request for 29 states that Rogers Cartage admits that these
25 same chemicals contained hazardous substances.

1 Next, consider the chemical constituents that were
2 found in Rogers Cartage waste water that have also been found
3 at the site. At Dead Creek Segment A sediment and groundwater
4 samples taken by IEPA in the 1980s shows the presence of PCBs,
5 dichlorobenzene, phenols and zinc. In Dead Creek Segment B
6 that same study in 1980 by IEPA shows the presence of those
7 similar constituents: Chlorobenzene, dichlorobenzene, phenols
8 and zinc. And to corroborate those samples some almost 19
9 years later samples taken by the EPA at Dead Creek Segment B
10 also indicate the presence of chlorobenzene, PCBs, phenols,
11 nitroaniline, and zinc. At Dead Creek Segment F the sampling
12 of soils and groundwater taken in 1999 indicate the presence of
13 chlorobenzene, nitroanilines, PCBs and zinc.

14 And if you recall Dr. Chirlin who testified, he was
15 our groundwater hydrologist. He opined that Dead Creek was a
16 losing stream and because it was a losing stream the lowest
17 creek sediments fell below the groundwater table which in
18 essence means the contamination that was present in those
19 sediments is now present in those groundwater. He specifically
20 testified and identified the existence of benzene,
21 dichlorobenzene and chlorobenzene in the groundwater at Dead
22 Creek Segment A.

23 The final element to be proven then, is there some
24 plausible migration pathway from Rogers Cartage truck washing
25 operations to the off-site points where contaminants were

1 released in the environment. Let's start with Cahokia. First
2 we have the fact witnesses. You recall the testimony of
3 Charles Johnson, a truck washer at the Cahokia facility for
4 five years who, along with his seven brothers, washed trucks
5 outside all year-round. He described the washing out of Rogers
6 Cartage chemical tankers with a steam Jeanie. He described how
7 the facility was open seven days a week and they would wash 15
8 trucks a day. And what's more important to note is that every
9 truck had heel in it.

10 And the heel contained the chemical product that that
11 particular tanker had hauled, and that's important because the
12 heels contain anywhere from five to ten gallons of material
13 that remain in the tanker upon its return to the depot for
14 washing so when Rogers Cartage had the trucks washed out that
15 heel went out along with the wash water to the wetlands in
16 Cahokia and to the drains in Sauget.

17 Mr. Johnson specifically recalled cleaning out of
18 malayic hydrate which he had to clean out very quickly because
19 it would blind him if he didn't. And the wash water that he
20 testified to that was coming out of the truck washing was dirty
21 with product. Mr. Johnson also described how the wash water
22 contained the chemical heels flowed into a large pond behind
23 the depot. In his words this was "all our product was running
24 here".

25 If your Honor recalls during Charles Johnson's

1 testimony he pointed out to the court the trucks that were
2 lined up along this facility. He also pointed out to the
3 facility where the trucks were washed and he pointed out that
4 the waste water from the truck washings made its way down into
5 this pond. As Mr. Johnson recalled that one weekend there were
6 so many chemicals in it it caught fire.

7 Charles' little brother Donel Johnson and Donald Mayer
8 also identified about this same lagoon. And they identified it
9 as a receptacle for contaminated wash water. And when asked if
10 you could fish in it, if you recall what Donel Johnson's answer
11 was: No, you couldn't fish in it. It's not a pond you could
12 fish in. Donel testified that the creek ran down the side of
13 Cargill Road. What he was referring was the ditch down Cargill
14 Road. He wasn't talking about Dead Creek but he was talking
15 about some sort of creek that had enough water in it that he
16 would -- a ditch that had enough water in it that he would
17 characterize it as a creek. This is the same creek, if you
18 will, that Mary Sitton saw from the air.

19 And that brings us to our experts. Mary Sitton's
20 historical aerial photograph dated 1968, which is this one,
21 through that photograph she was able to testify that she saw
22 pathways of migration. Through her testimony as to Plaintiff's
23 Exhibit No. 267-N Mrs. Sitton testified that she was able to
24 see drainage channels leading from the truck washing area to
25 the impoundments from here to here. That there was a breached

1 berm. Which was down in this area or as you can more aptly see
2 on Plaintiff's Exhibit 267 the yellow lines that show where the
3 breach is and a pool of liquid south of the berm that drained
4 toward the wetlands running along Dead Creek.

5 Now here is the second lagoon and she saw the pathway
6 leading down to this drainage ditch. This is the same ditch
7 that Donel Johnson identified to be a creek. This 1968
8 photograph is more than just a historical aerial photograph.
9 It in fact is photographic evidence of Rogers Cartage acts of
10 disposal.

11 Our other expert, Dr. Menzie, testified also about the
12 drainage patterns at and around the Cahokia facility but he did
13 so from a ground perspective. Dr. Menzie, whose personal
14 experience at Dead Creek dated back to 1980s, opined there were
15 impoundments that captured truck washing water and that the
16 slope of this area was such that the water would generally move
17 in this direction toward a ditch that runs down along Cargill
18 Road. His vision from the ground is the same as Mary Sitton's
19 vision from the air.

20 He further testified that the overflow had entered the
21 ditch, would then flow in this direction down into the wetland,
22 and from the wetland down into Cargill Road and joined Dead
23 Creek. So we had the drainage going down along the road, down
24 to the culvert, the culvert goes under Cargill Road and
25 discharges into this wetland. And as you can see from

1 Plaintiff's Exhibit 267 there are aerals which show where Dead
2 Creek intersects the wetland area. Dr. Menzie further opined
3 that even 32 years later sampling results taken from the
4 drainage ditch along Cargill Road revealed elevated levels of
5 zinc and PCBs. That's down along Carghill road. And if you
6 recall his testimony the sampling results showed increasing
7 levels as you went from the Cargill facility down towards the
8 wetland, which is what you would expect in a discharge
9 situation.

10 Now Rogers Cartage in its cross tried to attack the
11 sampling results and they tried to do this by saying the
12 sampling results which were taken down here were in fact wrong.
13 They were wrong because they should have been taken further up.
14 And that's because today as you and I sit here today there's a
15 fence that comes down here and this culvert has been made
16 bigger. It moves out this way. But that's not the point
17 because, as Mary Sitton testified, this whole area no matter
18 where you would have taken it was ponded up with water. So
19 that makes that irrelevant.

20 Thus as you can see the evidence leads to the
21 inescapable conclusion that not only was there a potential
22 pathway in this case there was an actual pathway.

23 Although it's not the burden of the United States to
24 disprove other possible sources of contamination in Creek
25 Segment F, Dr. Menzie, in fact, testified that soil sampling

1 data was not consistent with roadside contamination. As you
2 recall, Rogers Cartage tried to suggest that trucks running up
3 and down this road would have contributed. And Dr. Menzie
4 said, no, that was inconsistent with the findings. You would
5 have expected to have a more consistent finding in the
6 samplings along the road and that's not the case.

7 Rogers Cartage, on the other hand, must prove that its
8 disposal of chemical waste did not reach Creek Segment F. It
9 has not met it's burden of production. Let's consider what
10 Rogers Cartage showed. That's nothing. While Rogers Cartage
11 cross-examined about it was suggestion and innuendo. The fact
12 is Rogers Cartage provided no proof. Rogers Cartage did not
13 even put on a single witness to carry its burden to disprove
14 causation.

15 Now let's move to the Sauget facility. Through
16 requests for admissions Rogers Cartage had admitted that its
17 wash water containing a whole host of chemicals was down the
18 sewers and these wastes contained hazardous substances. I
19 refer you to 104(E) response number seven; request for
20 admission number 27; request for admission number 30 as
21 admitted. Rogers Cartage also admits that its drainage were
22 connected to the Village of Sauget sewer system. Answer to
23 number one and number three of the 30(b)(6) deposition on
24 written request. Finally Rogers Cartage admits that it was
25 connected to the south trunk of the village sewer that runs

1 along Falling Springs Road. Answer to interrogatory number
2 three.

3 Now as the court may recall this existing 1965 diagram
4 of the village sewer system got a lot of play during the trial.
5 Falling Springs Road runs north/south and the Falling Springs
6 lateral runs north/south. Several witnesses pointed out and
7 I'll discuss those how the discharge is moved up this line in
8 surcharge events how they would come back and the surcharge
9 would come back down into Dead Creek. Donel testified that
10 Rogers Cartage used wash trucks hauling PCBs, chlorobenzene,
11 and these substances were washed into bays that had drains the
12 size of manhole covers. You also heard him testify that during
13 his time not too many of the products were drummed except for
14 fatty acids. And the reason they drummed fatty acids was to
15 prevent these big manhole drains from being clogged up. The
16 court also heard testimony from two witnesses Paul Weis, the
17 village engineer, and Michael Foresman on how it was actually
18 designed to overflow into Dead Creek during surcharge events.
19 Paul Weis, the village engineer, explained in detail how waste
20 water from Rogers Cartage flowed through the village sewer
21 system during surcharge and that it would be routed into Dead
22 Creek. Specifically Rogers Cartage and the residences were
23 hooked up to the Falling Springs lateral right here.

24 The village sewer system had a blockage problem with
25 the Falling Springs lateral during Weis' time as a village

1 engineer and he said that it was primarily caused by the gunky
2 stuff that Rogers Cartage was discharging. Falling Springs
3 line also had an overflow and that was a 15-inch line that
4 discharged directly into Dead Creek and that was located at
5 manhole 28. As you recall manhole 28 is right here. There
6 were also overflow lines at manhole 24 that relieved the south
7 trunk line. That's further north along this line right here.
8 This overflow line also discharged into Dead Creek during surge
9 events.

10 Mr. Weis personally observed overflow surcharges into
11 Dead Creek relieving its south trunk line. That would be up in
12 this area in the northern part. And during the occasions when
13 there were surcharges pumping stations would keep the flow
14 moving up the 15-inch line so that it could not go back towards
15 Rogers Cartage, and instead it pushed it up the 15-inch line
16 and out. Now that was the case of the sewer system pre 1975.
17 Post 1975 there was a slight alteration. That alteration was
18 the 15-inch overflow line was now blocked. Post 1975 Falling
19 Springs wash water would then flow to manhole 28 through the
20 18-inch line and then up to the junction box. So post 1975 the
21 water would flow up towards here and out and up and around. It
22 no longer had the access to go directly to Dead Creek and
23 that's after 1975. However, Weis continued to see surcharge
24 events after 1975. And he also stated, as you might recall,
25 when asked how long the water would remain in Dead Creek after

1 surge rain events he said it would range anywhere from hours to
2 a week and there were occasions where Dead Creek was almost
3 brim full for a week.

4 Michael Foresman corroborates the testimony of
5 Mr. Weis. He testified generally to the operation of the sewer
6 system and in particular to the function of the Creek Segment A
7 as a surge pond. Mr. Foresman personally witnessed sewer
8 overflows on Creek Segment A on numerous occasions in the early
9 1980s. The United States as the potential pathway of migration
10 of Rogers Cartage discharges to Dead Creek from its Sauget
11 facility.

12 Now let's look at the contamination from the sewer
13 system to Creek Segment A that didn't say in Creek Segment A.
14 Michael Foresman testified that he observed overflow from Dead
15 Creek Segment A to Dead Creek Segment B through the culvert at
16 Queeny Avenue in the mid 1970s. This is Queeny Avenue. This
17 is Dead Creek Segment A, Dead Creek Segment B. Michael
18 Foresman observed overflow from Dead Creek Segment A to Dead
19 Creek Segment B. And that was in the mid 1980s. IEPA
20 memorandum also show that in the mid 1970s there continued to
21 be a problem with drainage going from Dead Creek Segment A to
22 Dead Creek Segment B.

23 And I pass up to the court Plaintiff's Exhibit 219 and
24 259. And finally let's of course remember the testimony of
25 Dr. Chirlin who was very clear and cogent in explaining how the

1 bottom portion of Dead Creek Segment A sediments are actually
2 under the groundwater table and the groundwater passes through
3 them and continually picks up contaminants from them. Again
4 the United States has demonstrated how the potential migration
5 of contaminants that were deposited into Creek Segment A got
6 into Dead Creek Segment B. Rogers Cartage on the other hand
7 did not prove that its acknowledged disposal of chemical waste
8 did not reach the creek. As discussed in supplemental trial
9 memorandum Rogers Cartage bears the proof on this, and by some
10 token bears the risk that its waste will become unrecognizable
11 through commingling with others, especially those of Monsanto
12 and Cerro and the other large industries also connected to the
13 sewer system. There is no de minimus defense and there is no
14 equitable defense.

15 And if the court recalls we discussed the defenses
16 available under CERCLA. And an act of God, an act of war, an
17 act or omission of third party other than employee or agent of
18 the defendant, or any combination of the foregoing paragraphs.
19 And none of those defenses have been met in this case. They've
20 not even been argued.

21 So, your Honor, those are the stories of how Rogers
22 Cartage disposed of chemical wash waters containing some
23 hazardous substances found in contaminated sediments and
24 groundwater which makes Rogers Cartage liable as an arranger.
25 At Sauget Rogers Cartage arranged with the village to use its

1 sewer system to dispose of hazardous substances which were
2 released at an off-site location. And at Cahokia the
3 arrangement was to stockpile contaminated wash water on an on
4 site area and drain to the wetlands abutting to Dead Creek and
5 then to Dead Creek itself. To the extent that Rogers Cartage's
6 arrangement at Cahokia was with itself and the particular
7 topography of its facility and was not an actual contract with
8 a third party, which is not needed, we also offer another
9 theory of operator liability which has been recognized by the
10 Seventh Circuit which I'm referring to the *NutraSweet* case.

11 In conclusion, I would say that Rogers Cartage
12 operated at Cahokia for at least five years. During which time
13 it continually discharged chemical laden waste water to lagoons
14 that spilled and leaked into the wetlands adjoining Dead Creek.
15 For at least another five years its operation at Sauget
16 similarly contaminated wash water to the sewer system designed
17 to route surcharges to Dead Creek. In my opening, if you can
18 recall, it seems like it's been forever, I told you that
19 companies like Rogers Cartage who conduct business as usual at
20 the expense of the environment are exactly who Congress had in
21 mind when it structured CERCLA as a strict liability statute.
22 And under CERCLA the burden of proof placed on the United
23 States is limited, while the burden to refute causation placed
24 on the polluter is not limited.

25 Congress wanted to ensure that the polluter pays.

1 Rogers Cartage is the polluter here and they should pay. Thank
2 you.

3 *THE COURT:* Mr. Schultz, I'm going to give you about
4 five minutes to get your thoughts together and I'll hear your
5 closing argument. The court's in recess.

6 *(Recess).*

7 *THE COURT:* Be seated. Mr. Schultz, before you make
8 your argument there and make any points that you wish to make
9 and points that you should address as to part A of Dead Creek
10 address the argument that there was necessarily a discharge
11 because of the sediments were actually lower than the water
12 table itself and as to the Cahokia facility address the
13 argument that the defendant's expert says that she discerned
14 there was an overflow from the impoundment which lead directly
15 into the wetlands. Those are the two things I ask you to
16 address. Do whatever else you need to.

17 *MR. SCHULTZ:* First, with regard to the sediments in
18 Dead Creek A. Point number one is Dead Creek A is out of this
19 case, and I refer you to the transcript, it was unconditionally
20 removed by the defendant. And the transcript on pages 72, 116,
21 457, 752, and 753 it was reiterated that Dead Creek A is out of
22 the case.

23 *THE COURT:* I thought I read where in the opening
24 statements or somewhere she said, other than the groundwater,
25 your Honor, I don't wish to mislead you.

1 MR. SCHULTZ: I think that happened two or three days
2 into the trial when the government saw the quality of their
3 evidence. Second, with regard to it was Dr. Chirlin and Creek
4 Segment A in the evidence. Dr. Chirlin testified and this is
5 on page 783 and 784 Dr. Chirlin testified that he had no
6 opinion about the source in the ground with regard to
7 companies. Second, he stated that he didn't know when the
8 contaminants were put into the groundwater whether it was in
9 the '50s or '60s. And third, on page 783 going on to page 784
10 of the transcript he states he doesn't know when those low
11 sediments that were referred to in closing argument were
12 deposited.

13 And further Dr. Chirlin testified that he has no
14 opinion that after 1990 when Dead Creek A was dissolved or
15 destroyed that pollutants are still being put into the
16 groundwater and he was unable to opine and that occurs on
17 page 790 of the transcript.

18 THE COURT: All right.

19 MR. SCHULTZ: Okay. And then the other point was,
20 with regard to the Cahokia facility Mrs. Sitton's testimony
21 that she thought she saw from an aerial photo a discharge from
22 that pond on the Cahokia site. First she was uncertain. She
23 said it was a possible or probable discharge. And second, we
24 have the testimony of both Donel Johnson and Charles Johnson
25 that no such discharge occurred. Charles Johnson testified in

1 the transcript on pages 624 and on pages 637 that there was no
2 runoff or discharge from the pond. And Charles Johnson was
3 there every working day. Donel Johnson testified that when he
4 was working there on the weekends he never saw water leaving
5 the pond, and that's on pages 645 and 646 of the transcript.
6 So we have two eyewitnesses who defeat the government's
7 causation claim with regard to Cahokia.

8 In addition, your Honor, Mrs. Sitton testified that
9 she had no idea what was in the water. She had no idea of the
10 volume of the water. She had no idea of the flow rate of the
11 water. From that it could be a teaspoon full or a fire hose.
12 Whatever it is there is no evidence to that. If it's a
13 teaspoon full it never got to Dead Creek no matter what their
14 story is, and, as I said before, we have two eyewitnesses who
15 said nothing left the pond.

16 With regard to their case in general, on page 3 of the
17 new brief they filed they state that they have to prove that
18 Rogers Cartage disposed of hazardous substances at the site,
19 which in this case is Dead Creek. That's their burden of
20 proof. With regard to Sauget, we have the testimony of
21 Mr. Paul Weis that he saw Dead Creek-- he saw the sewer go into
22 Dead Creek five to ten times from '73 to '90. And we have the
23 testimony of Paul Weis that when the sewer did go into Dead
24 Creek it would flow in for two to three hours and most of the
25 time flow out in six to 12 hours. Now point A is Dead Creek A

1 is not in the case and there's absolutely no testimony in the
2 case that any waste water from Rogers Cartage ever got into
3 Dead Creek B. Period. That alone ends the case.

4 But let's go on and look at Dead Creek A for a moment.
5 In order for the government to show that Rogers Cartage has put
6 hazardous substances into Dead Creek A they have to show, one,
7 that Rogers Cartage's sewer flows could get through Monsanto's
8 7,000 gallons per minute when Rogers Cartage's ten gallons per
9 minute.

10 Second, to show on those rare occasions the five to
11 ten times for the two to three hours a piece that the sewer
12 backed up into Dead Creek that Rogers Cartage was actually
13 opened. Because as Dr. Menzie said, Rogers Cartage was a
14 five-day-a-week operation and if we weren't open we had no
15 waste water flows. Then if they can show we were open they
16 would have to show we were actually washing some of these six
17 trailers a day that Dr. Menzie, who studied Rogers Cartage,
18 said we washed.

19 Third, if we were washing a trailer during that two-
20 to three-hour period did the trailer contain chocolate, soybean
21 oil, fatty acids, vegetable oil, or did it contain a hazardous
22 chemical.

23 Judge, you can tell from the closing statement of the
24 government and you can tell from the evidence that there is no
25 evidence. The government has been unable to even point out a

1 particular time when the sewer overflowed into Dead Creek A.
2 The government has introduced no evidence that Rogers Cartage
3 was opened at this time. The government introduced no evidence
4 that Rogers Cartage was cleaning a trailer which had hazardous
5 substances at the time. Their proof simply fails on all those
6 points. Not only is there no evidence that Rogers Cartage got
7 anything into Dead Creek Segment B, there is no evidence that
8 the government has put forth to prove that Rogers Cartage put
9 any hazardous substances into Dead Creek Sector A, which is out
10 of the case.

11 And the government keeps harping on the fact that the
12 chemical constituents found in Dead Creek Segments A, B, C, D
13 are from Rogers Cartage and Dr. Menzie himself testified that
14 there are at least ten sources of those chemicals: Monsanto,
15 Cerro, Midwest Rubber, Darling Fertilizer, American Zinc, all
16 of whom -- and Wiesy, half of whom had direct pipes into Dead
17 Creek A and some into Dead Creek B, and all of whom are large
18 contributors to the sewer system. And Dr. Menzie testified
19 that all of the PCBs in Dead Creek could have come just from
20 Cerro Copper alone. So the fact that Dead Creek Segments A, B,
21 C, D, E, F are contaminated does nothing prove that any of that
22 came from Rogers Cartage. We have about ten companies, huge in
23 proportion to Rogers Cartage, who have already admitted in
24 court that they're liable.

25 With regard to Cahokia, we have the eyewitness

1 testimony that there were no discharges from the pond, and both
2 of those eyewitnesses are not friendly witnesses to Rogers
3 Cartage.

4 Second, we have Mrs. Sitton admitting she didn't know
5 when, how much, what was in it, or what was the flow rate of
6 anything from the Rogers Cartage facility.

7 The we have Dr. Menzie testifying that the Rogers
8 Cartage facility he doesn't even know if it is contaminated.
9 He doesn't know if the water from the facility is a source of
10 contamination. And then we have Dr. Menzie's interesting
11 testimony about how he chose and picked the data basis or the
12 data sets in order to show what he thought was a bump in Creek
13 Segment F.

14 Now as you have heard the government's original
15 experts, Chirlin and Dr. Beihoffer, did not find any peaks in
16 Creek Segment F. And Dr. Menzie was only able to find a peak
17 in Creek Segment F by taking one database for zinc and one for
18 PCBs and ignoring all the other data bases.

19 Then we have the testimony about the ditch where
20 Dr. Menzie, although he never tested the site and it is a
21 mystery to him whether the Rogers Cartage site is contaminated.
22 Dr. Menzie did have some testing done in a ditch within the
23 last I think it was 2002 and we have the interesting point made
24 by the government's own expert Mrs. Sitton that he tested the
25 wrong ditch. That the ditch he tested is a new ditch. That

1 the old ditch was covered up with a fence and a four-foot high
2 rock berm by Phillips Petroleum and Dr. Menzie said if he got
3 the wrong ditch then what he was testing for was not from
4 Rogers Cartage. Dr. Menzie testified that when he -- when you
5 test a ditch alongside the road there are dangers because the
6 ditch is subject to contamination from road work and traffic on
7 the road.

8 So with regard to Sauget the government's case fails
9 for two reasons. One, Dead Creek A is not in the case and
10 there is no evidence that anything Rogers Cartage has gotten to
11 B. And because the government didn't show in those rare
12 occasions when the sewer backed up into Dead Creek A after 1970
13 the government didn't show that Rogers Cartage was opened.
14 Didn't show that Rogers Cartage was washing trailers. It
15 didn't show that Rogers Cartage was washing a trail. It didn't
16 show that Rogers Cartage was washing trailers with hazardous
17 substances. As you remember, Dr. Menzie and every witness in
18 this case has testified that unlike every other industry in
19 this area Rogers Cartage's wash water was dependent on what
20 they were doing that moment. If they were washing a trailer
21 with chocolate, it had chocolate in it. If they were washing a
22 trailer with alcohol, it had alcohol in it. And they washed
23 six trailers a day which is more than an hour apiece. Unless
24 we were doing the right kind of trailer or the wrong kind of
25 trailer -- whatever your perspective is -- nothing in our wash

1 water would have had hazardous substances in it.

2 With regard to Cahokia we have eyewitness testimony
3 that the government's hypothesis fails. And we also have the
4 fact that Dr. Menzie admitted there are numerous sources of
5 contamination in what he tested and saw that did not include
6 Rogers Cartage. With regard to the findings in Dead Creek
7 Sector F as Mr. Ribordy said, EPA's own employee, the sediments
8 from upstream were what was tested for when the zinc was found.
9 And the sediments from up stream were what was tested for when
10 the PCBs were found. Because up stream in Dead Creek is a
11 heavily contaminated area with PCBs and zinc in it. As it
12 comes downstream at the corner the sediments are deposited in
13 the corner where the creek cuts to the right.

14 So, Judge, number one is the government has to prove
15 we put hazardous substances in the creek; they can't prove it.
16 They didn't prove it. They had more than a week to prove it.
17 In their attempt to prove it they in effect abandoned their own
18 witnesses. They abandoned Dr. Chirlin and Dr. Beihoffer and
19 hired Monsanto's expert Dr. Menzie at the last minute who
20 revealed on cross examination the uncertainty in his methods
21 and the uncertainty in his conclusions.

22 So, Judge, this is not a hard case. This is not a
23 case where the government has come close. This is not a case
24 where the lawyering on either side has made a difference. This
25 is simply a case where the evidence and the facts do not

1 support the government's case. How can they say that the pond
2 in Cahokia flooded into Dead Creek when Mr. Donel Johnson and
3 Mr. Charles Johnson both say no? How can they say that the
4 Sauget facility contributed hazardous substances to Dead Creek
5 when, one, Dead Creek A is out of the case; two, there's no
6 testimony anything Rogers Cartage did ever got into Dead Creek
7 B; and three, they have no evidence of when the sewer flooded
8 whether Rogers Cartage was opened, what we were washing at the
9 time.

10 So, Judge, for -- just because they haven't proved --
11 met their burden of proving we put hazardous substances in Dead
12 Creek I'm asking this court to enter judgment for Rogers
13 Cartage for the simple fact that we have not been proved to
14 have done anything wrong under superfund. The government has
15 failed to prove that hazardous substances from Rogers Cartage
16 made it into Dead Creek which is what they have to prove. And
17 which on page 3 of their brief they say they have to prove.
18 And the idea that we have no proof of anything when Donel
19 Johnson and Mr. Charles Johnson both testified what the
20 government said didn't happen, and the fact that Dr. Menzie
21 testified to numerous sources of contamination that obscure his
22 results and Dr. Menzie testified to his selective use of data
23 in order to show -- attempt to show that Rogers Cartage did
24 something to Dead Creek Sector F. Judge, all those things fall
25 by the wayside because the government didn't meet their case.

1 They had a week to do it and they didn't do it.

2 Therefore I'm asking this court to enter judgment for
3 Rogers Cartage. We should not be in this case and the
4 government hasn't proved that we should be. Thank you.

5 *THE COURT:* All right. The court in accordance with
6 Federal Rule of civil Procedure 52(a) will make its findings
7 here on the record immediately at the close of all the evidence
8 rather than preparing a detailed written memorandum.

9 Now this case, like so many cases once you get down to
10 an actual trial where there are real witnesses being subject to
11 cross examination, is not a difficult case. In the end the
12 parties themselves recognize the issue in the case. We start
13 out with the obvious proposition, the court so finds, that Dead
14 Creek Section B and south is polluted with hazardous
15 substances. The parties recognize that. Moreover, the parties
16 recognize that Rogers Cartage arranged for the disposal of
17 hazardous substances, many of which are the same as those found
18 in Dead Creek.

19 Moreover, we have here two facilities. There's no
20 question that Rogers Cartage had a facility that opened some
21 time I'm told after 1970 in Sauget. And it's equally clear to
22 the court that they, Rogers Cartage, at least operated a
23 facility in Cahokia.

24 Now the question of course is: Is there a causal
25 connection. In other words, was there a discharge from either

1 of these facilities operated by Rogers Cartage that finds its
2 way into Dead Creek? Now threshold of liability for this type
3 of case is low, and I've reiterated that time and again. No
4 need to show the fingerprint precision is not required. But
5 there is a standard of proof. Strict liability doesn't mean
6 absolute liability. It just means liability without fault.

7 I find, the court finds, that having heard all of the
8 evidence in the case that the government cannot meet it's
9 burden of proof regarding either facility.

10 Here's my thinking on this. The testimony regarding
11 the Cahokia facility is, at best, tenuous. As a matter of
12 fact, the only way the government gets this the hazardous
13 substances that was admittedly in this impoundment into Dead
14 Creek is by virtue of the mechanism suggested by the
15 interpretation of the aerial photographs. Now this judge
16 wasn't born yesterday. That particular expert is certainly an
17 expert in many respects, but she has the equipment and the
18 experience to read these historical photographs and draw
19 certain conclusions from them. The court is also aware that
20 this is a well-paid advocate. And I don't mean to say that in
21 a pejorative sense. In fact, everyone that will testify in
22 this case, at least every expert, is to some extent an
23 advocate.

24 We had two people who worked there who were right on
25 the scene and said they never saw this get out of the

1 impoundment. Now it's hard to believe that at some time it
2 didn't happen, but the court is not at liberty to engage in
3 speculation. I can draw reasonable inferences but the
4 inferences must be based on the evidence. Anything more
5 becomes speculation and I don't speculate any more than a jury
6 would be allowed to speculate. I'm not critical of the
7 government because they couldn't-- they didn't come up with any
8 other evidence. Perhaps this is all that could have been done
9 with what they had to work with. Maybe there is a settled
10 religious type faith that there was some discharge from the
11 Cahokia facility into the Dead Creek but that's all it is.
12 It's faith or informed speculation but it's not proof. The
13 standard has not been met in this case.

14 Now we go up to Sauget and there's no question again
15 that Rogers Cartage was discharging there into the sewer
16 system. And the court is not unaware of the fact that on one
17 occasion Rogers Cartage took it upon itself to fire a fella
18 because he wouldn't further pollute the-- put a pollutant into
19 the sewer system. And of course this is not something that we
20 applaud or look upon with favor, but I expect that Rogers
21 Cartage probably paid dearly for that. I don't have any
22 precise information but a lawsuit was filed and the witness
23 looked to be doing better than most truck washers do in his
24 stage in life. But that's not the point at any rate.

25 In as far as Section B is concerned, we had just the

1 slightest testimony that there was a faulty discharge through a
2 partially clogged what I'm going to call a whistle or a pipe.
3 But to say that any of that, any of that even contained a
4 pollutant of the type or has discharge of the type that Rogers
5 Cartage was using, again, is just mere speculation.

6 Now similarly, I'm not -- I'm told that Segment A was
7 out of it and I'm told that it is not. But the bottom line on
8 all of this is the best -- I mean, the best case that the
9 government has in this regard is that there were the sediment
10 was blow the water level itself. There was some hazardous
11 waste in the sediment. And so from that the expert inferred,
12 and it sounds reasonable to me -- and by the way I found him to
13 be a very persuasive expert -- that it was in the groundwater.

14 But the court's mindful that Rogers Cartage didn't get
15 to Sauget until after 1970. And we've had nothing but a
16 massive discharge of pollution in the Sauget area since the
17 1930s. And to say that that came from, as we must, from Rogers
18 Cartage, is to say too much. The court is not at liberty to
19 speculate. Now I'm fully aware of the common-sense notion
20 that, well, look, they're washing their trucks, they're putting
21 this into the sewer system, at some time or the other it gets
22 into the creek. Well, but the court on something like this
23 requires more than mere common sense. It requires proof. And
24 perhaps the proof just isn't available and never can be.
25 Again, I don't criticize the government. They took a pretty

1 good swing at it with what they had. But the court can't find
2 that there was ever in the Sauget facility a discharge that
3 found its way into Dead Creek.

4 So there being no discharge from either facility that
5 found its way to Dead Creek, at least by a fair preponderance
6 of the evidence, the defendant, Rogers Cartage, is entitled to
7 a judgment and it will receive it.

8 Now the only other issue is: The court on several
9 occasions expressed its displeasure with the matter of Rogers
10 Cartage contesting the issue of whether there was ever a
11 facility at Cahokia and that matter is being referred to the
12 magistrate, and I'll let Rogers Cartage and the magistrate deal
13 with that. It was abundantly clear to the court that everyone
14 knew there was a Rogers Cartage facility there. And I hope
15 with hindsight that they see it doesn't -- it was of no
16 assistance to Rogers Cartage. But I don't decide cases on the
17 basis of whether I feel that lawyers or even because I'm ill at
18 lawyers or clients. I decide the cases on evidence. And to
19 this court it is quite clear that the evidence is not there.
20 Judgment will be entered promptly for Rogers Cartage.

21 Now as I said earlier, it will be some time before
22 this case is ultimately over. This is hard for litigants to
23 understand but if there are some representatives of the
24 litigants I'll just explain it and maybe take some heat off of
25 your lawyers here. At least in the Seventh Circuit we do not

1 take appeals piecemeal. The court prefers -- it is more than a
2 preference. The court enforces the Federal Rules of Civil
3 Procedure such that, except in very rare instances, they want
4 the whole case there at one time to review the whole thing.
5 This case will not be over for years to come. I've got the
6 issue of apportionment between the rest of the defendants that
7 are in the case and then I have to determine what the damages
8 are.

9 However, the court has determined that here in the
10 trial court for my purposes Rogers Cartage is not in the case,
11 but there will not be an appeal from that. At least I don't
12 intend to authorize an appeal from that finding until after the
13 entire case is at an end. I've made that mistake before and I
14 generally don't make the same mistake twice. So there being
15 nothing further before the court then the court stands in
16 recess.

17 REPORTER'S CERTIFICATE

18 I, Molly N. Clayton, RPR, Official Court Reporter for the
19 U.S. District Court, Southern District of Illinois, do hereby
20 certify that I reported with mechanical stenography the
21 proceedings contained in the foregoing 34; and that the same is
22 a full, true, correct and complete transcript from the record
23 of proceedings in the above-entitled matter.

24 DATED this 12th day of December, 2003.

25 Molly Clayton
Molly Clayton, RPR

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

**PHARMACIA CORPORATION (f/k/a
Monsanto Company), et al.**

Defendants.

**PHARMACIA CORPORATION (f/k/a
Monsanto Company) and SOLUTIA, INC.,**

Counterclaim Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Counterclaim Defendants.

CIVIL NO. 99-63-GPM

ORDER

MURPHY, Chief District Judge:

The United States asks the Court to reconsider its ruling holding Rogers Cartage not liable (*see* Doc. 667). In a nutshell, the United States claims that it has new evidence that was not presented in the November 2003 trial that proves Rogers Cartage liable.

The issue of the location of a Cahokia facility and the relationship of Rogers Cartage to that facility was hotly contested during the trial. Under Federal Rule of Civil Procedure 54(b), the Court's decision "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." FED. R. CIV. P. 54(b). But the Court is not inclined to change its decision in any way. The United States had years to investigate this case and gather evidence to prove its claims. The Court heard testimony for three days and rendered its

decision. It is too late to present the new evidence the United States wants to present, and the Court will not reopen discovery and try the case again. The motion for reconsideration (Doc. 667) is **DENIED**.

Because Rogers Cartage has been found not liable under CERCLA § 107, 42 U.S.C. § 9607, the claims against Rogers Cartage for contribution fail as a matter of law. Accordingly, the motion to dismiss contribution claims filed by Rogers Cartage (Doc. 658) is **GRANTED**. All claims against or by Rogers Cartage are **DISMISSED with prejudice**. The Clerk will enter judgment accordingly at the conclusion of the entire action.

The motion for trial setting by Solutia/Pharmacia (Doc. 626) and the motion for leave to file supplemental authority (Doc. 633) are **DENIED as moot**. At a hearing on April 14, 2004, the Court set the second liability phase for trial on **Monday, October 12, 2004**. That setting remains firm.

Finally, the pending motions for summary judgment (Docs. 539, 542, 544, and 551) are set for **HEARING on Monday, September 27, 2004, at 1:30 p.m.**

IT IS SO ORDERED.

DATED 08/09/04

s/ G. Patrick Murphy
G. PATRICK MURPHY
Chief United States District Judge

RE: Conoco Phillips/Rogers Cartage site

to: Thomas Martin

08/06/2010 12:52 PM

Tom,

The Court never issued a written decision at trial, but gave a lengthy oral ruling. Attached is the transcript. The US moved for reconsideration, which was denied in the attached short written decision.

The Court's ruling addresses both of the RC sites: (1) the one off of Falling Springs Road (referred to by the Court as the Sauget facility); and (2) the one off of Red Hill Road, now known as Cargill Elevator Road (referred to by the Court as the Cahokia facility). As I read the court's rulings, Judge Murphy said that the known contamination at RC's Cahokia facility did not make it liable for response costs at Sauget Area 1 because the Cahokia facility was not in Area 1 and the US had not proven that its contaminants seeped into Area 1.

Let's talk next week about how to respond to Mr. Schultz's letter.

Mike

Michael J. Zoeller
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Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
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(202) 305-1478

-----Original Message-----

From: Martin.Thomas@epamail.epa.gov
[mailto:Martin.Thomas@epamail.epa.gov]
Sent: Tuesday, August 03, 2010 6:22 PM
To: Zoeller, Michael (ENRD)
Subject: Conoco Phillips/Rogers Cartage site

Hi Mike, I am replying to the attached letter (we have tried but failed to get Rogers to consent to particulate in the cleanup of its former facility on the Conoco Phillips property) and because I didn't participate in the Rogers SA litigation I wondered if you could provide to me whatever info you have on the Rogers SA judgment. Is there a description in the file on this? For example, I need to confirm that the judgment did not include the Rogers site on the Conoco Phillips property. I believe the Site subject to the judgment was located off of Falling Springs road in Sauget but need to confirm this type of basic info too. Are there other Rogers exhibits in the file that might be helpful? Tom

Thomas J. Martin
Associate Regional Counsel
Office of Regional Counsel

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----- Forwarded by Thomas Martin/R5/USEPA/US on 08/03/2010 05:15 PM

From: R5XEROX_R1302@epa.gov

To: Thomas Martin/R5/USEPA/US@EPA

Date: 08/03/2010 05:13 PM

Subject: Scan from a Xerox WorkCentre

Please open the attached document. It was scanned and sent to you using
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WorkCentre Location: R1302

Device Name: R5XEROX_R1302_7665C

(See attached file: Scan001.PDF)

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